United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 13, 2006

TO : Alan B. Reichard, Regional Director

Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Wal-Mart Stores, Inc. 506-2017-1700

Case 32-CA-22175 506-2017-5000

512-5012-1725-2200 512-5012-1725-3300

512-7500

This Section 8(a)(1) California access case was resubmitted for advice on whether the Region should issue complaint regarding the Employer's denial of access to nonemployee Union demonstrators to its exterior property. In a prior memorandum, we instructed the Region to identify specific Union conduct that would be protected under Section 7 and the Moscone Act and issue complaint so the Board could reconsider the Ninth Circuit's decision in NLRB v. Calkins¹ regarding nonemployee Union access rights under California law. We now conclude that the Employer did not violate Section 8(a)(1) by denying access to the Union, and therefore this case is not a vehicle to place this issue before the Board.

The facts and background of this matter are set forth in detail in our Advice Memorandum dated December 23, 2005. Briefly, as part of a consumer publicity campaign against the Employer, the Union held a large rally at the Employer's store on May 7, 2005, attended by about 250 nonemployee demonstrators. The demonstrators picketed and handbilled customers on the public sidewalks at the perimeter of the parking lot. Other aspects of the demonstration took place in the Employer's private parking lot. Thus, demonstrators drove their cars in a caravan through the lot, honking their horns and waving picket signs outside their car windows; some stood alongside the private driveways leading into the lot and attempted to hand literature to customers driving in; and some pickets periodically walked slowly across driveway entrances, causing customers to slow or stop their cars to let them pass.

 $^{^{1}}$ 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000), enfg. 323 NLRB 1138 (1997).

² All dates are in 2005 unless otherwise indicated.

The Employer's store manager came outside and told a Union official that the demonstrators must leave its property or face arrest. When the demonstrators refused to leave, he went inside and called the police. When the police arrived, they informed the demonstrators that the Employer maintained rules restricting nonemployee access to its exterior property. Nonetheless, the demonstrators refused to leave the property or agree to abide by the time, place, and manner restrictions. The police suggested that the Employer sign a citizen's arrest form against the Union demonstrators, but the store manager refused. The Union continued to leaflet and picket the store from May 14 until July 16 without making any effort to comply with the Employer's time, place, and manner restrictions.

In our previous memo, we concluded, inter alia, that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by interfering with the Union's right, as set out in the Moscone Act³ and interpreted in Sears, 4 to access the Employer's exterior premises to engage in peaceful expressive activity related to a labor dispute. We acknowledged that the Board had recently noted in Macerich Management Co.⁵ that, under Waremart II, 6 the Moscone/Sears

³ Cal. Code of Civ. Proc. §527.3 ("[t]he acts enumerated in this subdivision...shall be legal, and no court [shall issue any order] which...prohibits...(1) [g]iving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace [and] (2) [p]eaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers").

⁴ Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 158 Cal.Rptr. 370, 374 (Cal. 1979), cert. denied 447 U.S. 935 (1980) (Moscone Act's language "leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity...[declared lawful under prior California law]"). See also <u>In re Lane</u>, 79 Cal.Rptr. 729, 731-32 (Cal. 1969) (allowing business to declare sidewalks and parking lots surrounding their premises off limits to union activity would encourage others to erect similar "[c]ordon[s] sanitaire[s]" to immunize themselves against criticism and have serious impact on free speech).

 $^{^{5}}$ 345 NLRB No. 34, slip op. at 4 (2005).

line of cases does not represent current California law. We noted, however, that the Board in Macerich did not address the Ninth Circuit's Calkins decision, which relied in part on Sears to find that a property-owner could not bar peaceful nonemployee union handbilling from the exterior premises of its grocery store. Because Calkins remains the Ninth Circuit's view of California law, and the Board must apply state law in nonemployee access cases, we concluded that the instant case was an appropriate vehicle for the Board to address the viability of Calkins. We further instructed that the complaint in this case should only attack Employer denials of access based on Union demonstrators conduct protected under both Section 7 and the Moscone/Sears rationale.

Pursuant to our memo, the Region further analyzed the Union's activity on the Employer's property to determine whether it was protected under Section 7. The Region has concluded that the bulk of the Union's conduct on the Employer's property was not protected under Section 7. Thus, the Region has concluded that the Union's conduct on May 7 - driving a caravan of cars through the parking lot while honking horns and waving picket signs, and walking in front of cars attempting to enter the lot - obstructed traffic and generally impeded ingress and egress to the Employer's facility. The Board has found similar conduct to lose the protection of the Act. 10

⁶ Waremart Foods d/b/a Winco Foods, Inc. v. NLRB, 354 F.3d 870, 875 (D.C. Cir. 2004), rehearing en banc denied April 7, 2004, denying enf. 337 NLRB 289 (2001).

 $^{^{7}}$ <u>NLRB v. Calkins</u>, 187 F.3d 1080, 1091 (9th Cir. 1999), enfg. 323 NLRB 1138 (1997).

⁸ Bristol Farms, 311 NLRB 437, 438-39 (1993).

⁹ We also decided not to authorize complaint attacking the facial validity of the Employer's time, place, and manner rules, in part, because the California courts have not yet addressed the validity of time, place, and manner rules under the Moscone/Sears rationale. Likewise, we did not authorize complaint under a Moscone/Sears rationale attacking the Employer's attempts to enforce those rules after the Union became aware of them. Therefore, our discussion of whether the Union's conduct was protected is limited to the May 7 rally before the Union was informed of the Employer's restrictions.

^{10 &}lt;u>Great American</u>, 322 NLRB 17, 20-21 (1996) (employer lawfully summoned police to evict handbillers because they

We recognize that, viewed in isolation, certain Union conduct on the Employer's property arguably remained protected under Section 7. This would involve the expenditure of additional time and resources as the Region conducts a further investigation to determine whether the Union demonstrators' handbilling of customer cars entering the parking lot created an actual or potential traffic hazard or impeded access to the lot so as to remove the protection of the Act. 11 However, the Union's handbilling of customer cars did not occur in isolation. Rather, it was but one aspect of a large, raucous rally where demonstrators were also engaging in unprotected activity. Under these circumstances, we would not argue that the Employer's store manager, when initially confronting the demonstrators on its property, was obligated to separate out the arguably protected handbilling of cars from nearcontemporaneous unprotected conduct.

For these reasons, the Employer's interference with the Union demonstration on its property on May 7 would not have warranted the issuance of a Section 8(a)(1) complaint

stopped traffic and caused it to back up into the street, creating potentially dangerous traffic conditions and infringing on the employer's property rights by preventing customers from entering the lot unimpeded); Nations Rent, <u>Inc.</u>, 342 NLRB No. 19, slip op. at 3 (2004) ("[i]t is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests"). Cf. Saia Motor Freight Line, 333 NLRB 784, 784 (2001) (employer lawfully surveilled nonemployee union handbillers stationed in center of driveway leading to freight terminal which impeded traffic and raised safety and liability concerns); Tecumseh Foodland, 294 NLRB 486 (1989) (in conducting Jean Country balancing, Board found that nonemployee union handbilling and picketing in front of store entrance and in driveway entrance, which backed up traffic, "impermissibly impaired [the employer's] private property right").

 11 Compare <u>Great American</u>, supra, 322 NLRB at 20-21, with <u>Greenbrier</u>, 340 NLRB 819, 819-820 (2003), enf. denied 377 F.3d 394 (4th Cir. 2004) (employer hotel/resort violated 8(a)(1) by contacting police in order to remove union pickets from public property outside resort entrance when employer had no basis for concluding that pickets had lost the protection of the Act by creating an actual or potential traffic hazard or interfering with the employer's private property interest).

even prior to the <u>Waremart II/Macerich</u> rejection of the Moscone/<u>Sears</u> line of cases. Accordingly, we agree with the Region that this case is not a vehicle for the Board to assess the Ninth Circuit's decision in <u>Calkins</u>. The charge allegation should be dismissed, absent withdrawal.

B.J.K.